

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

- and -

BESTMONT HOTELS

Respondent

FACTUM FOR THE RESPONDENT

(2021 – 2022 Harold G. Fox Intellectual Property Moot)

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PART I: OVERVIEW

[1] The *Copyright Act* promotes a balance between the public benefit in using copyrighted works and securing a fair reward for the creators of original works. The Appellant, Ms. Wanda Rer (“Ms. Rer”), seeks to profit from a collection of unoriginal photos in which she does not hold copyright. To allow this appeal would permit Ms. Rer to unjustly benefit from the *Act*’s protection of the legitimate rights of original creators.

Théberge v Galerie’Art du Petit Champlain Inc, 2002 SCC 34 at para 5 [*Théberge*].
Copyright Act, RSC 1985, c C-42 [*Act*].

[2] Ms. Rer took photos of the Respondent’s, Bestmont Hotels (“Bestmont”), iconic copyrighted hotel designs and marquees. Bestmont refused Ms. Rer’s offer to licence these photos for use in its marketing materials, on the basis that Ms. Rer had infringed Bestmont’s registered copyright. Ms. Rer initiated a claim against Bestmont, erroneously alleging that its subsequent decorative display of the photos, in its guest hallways, infringed her copyright. Bestmont reasonably believes it was entitled to display these reproductions of its designs.

[3] The Court of Appeal correctly concluded that Bestmont did not infringe Ms. Rer’s copyright. Ms. Rer did not own copyright in the photos as they lack originality. Further, Ms. Rer’s photographs are merely a reproduction of Bestmont’s registered copyright in the hotels’ designs and marquees. As such, Bestmont holds full rights to reproduce those works.

[4] Even if copyright was assigned to Ms. Rer, the Court of Appeal’s assessment of damages was appropriate. At trial, Justice Lodge’s award of \$1.5 million in statutory and punitive damages demonstrates an incorrect application of the *Act*. In the absence of a commercial purpose, unreasonable conduct by Bestmont, or harm to Ms. Rer, this award does not reflect the actual circumstances of the case or the *Act*’s object of obtaining *just* rewards for creators.

[5] For these reasons, the Court of Appeal’s decision must be upheld.

PART II: STATEMENT OF FACTS

[6] The Appellant, Ms. Rer, is a social media influencer who has earned a living sharing digital photographs from her travels with her social media followers for nearly a decade.

Wanda Rer v Bestmont Hotels, 21 TCCIP 1222 at para 1 [*Trial*].

[7] The Respondent, Bestmont, is a Canadian luxury hotel chain. For over 100 years, Bestmont has worked to build its esteemed reputation. The hotel is best known for its unique exterior hotel designs, located in Canada's most sought after destinations. Each hotel features a red marquee at its entrance that is widely recognized and associated with the Bestmont brand.

Trial, supra para 6 at para 2.

[8] To protect its carefully curated and famed design, Bestmont registered copyright in the architectural design and marquee in each of its hotels.

Trial, supra para 6 at para 11.

[9] Over the span of one year, Ms. Rer travelled across Canada visiting each of the ten Bestmont locations along the way. During this time, Ms. Rer worked on a photo project called "Façades." The Façades project was intended to showcase Bestmont's copyrighted designs.

Trial, supra para 6 at para 3.

[10] Ms. Rer used an identical and generic set up for each photo to ensure they framed and replicated the hotel façades as a focal point. These ten images constitute the "Original Photos."

Trial, supra para 6 at para 4.

[11] Using a popular social media platform, Ms. Rer mechanically applied pre-set, standardized filters to each of the Original Photos. These forty photos constitute the "Filtered Photos".

Trial, supra para 6 at para 5.

[12] Ms. Rer then gave Bestmont a digital portfolio, containing fifty sample images (the ten Original Photos and the forty Filtered Photos) that featured its own hotel's design. Ms.

Rer offered to licence the photos for Bestmont for use in its “marketing materials at a rate of \$3,000 per image.” She also offered to apply different filters to these photos at Bestmont’s request.

Trial, supra para 6 at para 6.

[13] Upon viewing the photos, Bestmont rejected Ms. Rer’s offer and informed her that she had infringed its copyright in its signature designs.

Trial, supra para 6 at para 7.

[14] Believing Ms. Rer had no rights to the infringing photos, Bestmont repurposed them.

[15] Bestmont applied its own choice of filters to the Original Photos, using a different application. It used its own versions of the photos to decorate its private guest floors.

Trial, supra para 6 at para 8.

[16] Ms. Rer filed an action, accusing Bestmont of copyright infringement. She sought a permanent injunction and the maximum award of statutory damages under s. 38.1 of the *Act*.

Trial, supra para 6 at para 9.

[17] Bestmont denied Ms. Rer’s claim, on the basis that Ms. Rer held no copyright in the Façade photos. Moreover, Bestmont asserted its own right to reproduce its copyright in the marquee and hotel designs.

Trial, supra para 6 at para 10.

[18] In good faith, Bestmont removed the photos before trial resolving the injunction issue.

Trial, supra para 6 at para 10.

[19] Justice Lodge, incorrectly found that Bestmont infringed Ms. Rer’s copyright in 50 works, awarding her \$1,000,000 in statutory damages and \$500,000 in punitive damages.

Trial, supra para 6 at para 20.

[20] Upon appeal, Justice of Appeal Lobi correctly overturned the trial decision in finding non-infringement and consequently awarding no damages.

Bestmont v Wanda Rer, 2021 CAIP 333 at paras 4, 10 [*Appeal*].

PART III: POINTS IN ISSUE

[21] **Issue One:** Bestmont did not infringe Ms. Rer's copyright in the Façade photos.

[22] **Issue Two:** If Bestmont infringed, only a low quantum of damages is appropriate.

PART IV: ARGUMENTS IN BRIEF

Issue One: Bestmont did not infringe Ms. Rer's copyright in the Façade photos

A. The Façade photographs are not subject to copyright

i. The Original Photographs are only a reproduction of the marquee and hotel

[23] Bestmont registered its copyright in the design of each of its hotels and marquee. As such, Bestmont is presumed to hold copyright in them pursuant to s. 53(2) of the *Act*. As owner of the copyright in these works, Bestmont has sole and exclusive right to reproduce them.

Act, supra para 1, s 53(2).

[24] Applying s. 32.2(1)(b) as an exception is misguided, as it only excuses what would otherwise be an act of copyright infringement. Section 32.2(1)(b) protects the creation of original works, but Ms. Rer did not create original works. Further, her photos are a reproduction of Bestmont's artistic efforts in designing its hotels. These photos differ from what the *Act* protects.

Trial, supra para 6 at para 18.
Act, supra para 1, s 32.2(1)(b).

[25] While s. 32.2(1)(b)(i) may protect the reproduction of architectural works in photos, s. 32.2(1)(b)(ii) does not protect the reproductions of sculptures situated in exclusive, private locations. The marquee is its own unique piece of art that is separate and distinct from the architectural design of the building. It ought to be treated as a sculpture permanently situated in a private space and should thus be protected from the application of this exception in the *Act*.

Act, supra para 1, s 32.2(1)(b).

[26] The marquee is located on Bestmont’s private property. These hotels are not public squares or public buildings where anyone can go. They are exclusive and private luxury hotels. Bestmont has the right to control who is or is not allowed on its property. Bestmont’s unique exterior designs in the hotels, particularly the marquee, are a cornerstone of its strong reputation. It should not be exploited by Ms. Rer, a guest, attempting to profit from what are mere reproductions of Bestmont’s works. Bestmont has the right to control such reproductions.

R v Hicks, 2013 NSCA 89 at para 30.

[27] This issue was raised in one of the only cases in Canadian jurisprudence addressing this subsection of the *Act*, *Therrien*. In a similar situation, the plaintiff’s sculpture was fixed in a private home and photographed without permission by the defendant, who later reproduced the photo in an advertising brochure in violation of s. 32.2(1)(b)(ii) of the *Act*. Like in *Therrien*, Ms. Rer’s photos of the marquees, which were located on private property, were in violation of the *Act*.

Therrien v Schola Inc, 1981 CarswellNat 1035 at para 8, 8 ACWS (2d) 66 [*Therrien*].

ii. The Original Photographs are purely mechanical in nature

[28] The ten Original Photos taken by Ms. Rer are not subject to copyright protection due to its lack of originality. Ms. Rer failed to exercise the necessary skill and judgement in taking the photographs, as her actions were purely mechanical in nature.

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 at para 16 [*CCH Canadian*].

[29] Section 5(1)(a) of the *Act* provides three conditions to be met for Ms. Rer to hold copyright in each Original Photos. Only the second of these conditions is at issue – the photos’ originality.

Act, *supra* para 1, s 5(1)(a).

[30] In *CCH Canadian*, the Court stated a work “must not be so trivial that it could be characterized as a purely mechanical exercise.” While a work need not be creative, it requires some exercise of skill and judgement by the author. Skill requires the use of knowledge or a developed

aptitude to produce a work, whereas judgement requires the exercise of opinion, evaluation, or discernment to compare options in a work's creation. Ms. Rer's photos did not meet this threshold.

CCH Canadian, supra para 28 at para 16.
Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd, 2021 FC 314 at para 22
[*Patterned Concrete*].

[31] Ms. Rer is not expressing an original idea but has instead used a mechanical process to copy Bestmont's work. Ms. Rer's set-up had no originality, it simply involved standing far enough away to centre the key elements of the hotel façade, with the marquee as the focal point. This could have only been set up in a limited number of ways. This set up was mechanical – requiring no skill. There was no discernment to compare options in creating the Original Photos.

[32] Additionally, the Trial Judge was misguided in defining Ms. Rer's photos as derivative works, thus deserving of copyright protection. The Supreme Court, in *Théberge*, noted that the concept of derivative works is foreign and does not form a part of the Canadian copyright regime. Thus, it is not something that Ms. Rer can benefit from.

Trial, supra para 6 at para 18.
CCH Canadian, supra para 28 at para 9.
Théberge, supra para 1 at para 71.
Wiseau Studio, LLC et al v Harper et al, 2020 ONSC 2504 at para 149 [*Wiseau*].
Berne Convention for the Protection of Literary and Artistic Works, WIPO (1982, Geneva).

[33] Thus, the Façade photos fails to satisfy the second condition of copyright. The photos are not a reflection of skill and judgement and are not original. Copyright therefore does not subsist in any of the ten Original Photographs taken by Ms. Rer.

iii. The filters were mechanically applied to the photographs

[34] The Filtered Photographs do not meet the originality threshold as they were created with the single, mechanical click of a button that automatically applied enhancements to the photos. They do not meet the requirements outlined in s. 5(1)(a) of the *Act*.

Act, supra para 1, s 5(1)(a).
CCH Canadian, supra para 28 at para 16.

[35] When applying the definition of an “artistic work,” the courts must evaluate whether intellectual effort was applied to produce a work. In *Delrina*, the Court held that there is no originality where there is only a limited number of ways to express the same idea – demonstrating eligibility for copyright. Social media platforms intentionally provide limited, standardized filtering options to make its applications easy to use. As a social media influencer, Ms. Rer chose the four filters from a pre-set catalogue that pre-designed any changes to the images. In choosing from a standardized list of filters, Ms. Rer did not demonstrate intellectual effort.

Red Label Vacations Inc v 411 Travel Buys Ltd, 2015 FC 18 at para 99 [*Red Label*].
Delrina Corp v Triolet Systems Inc, 2002 CarswellOnt 633 at para 48, OJ No 676 [*Delrina*].

[36] As noted in *Ateliers Tango*, in photography especially, “originality is recognized by the choice, arrangement, and placement of the subject” as well as “the angle of view and lighting, and artistic work and personal effort of the photographer [translated].” The Filtered Photographs do not demonstrate any of these elements. Ms. Rer’s choice to filter through an automatic, electronic-enhancement process provides no effort or influence in how the images will be altered.

Ateliers Tango Argentin Inc v Festival d’Espagne et d’Amérique Latine Inc, [1997] JQ no 3693 at para 39, RJQ 3030 [*Ateliers Tango*].

[37] Ms. Rer made simple electronic photo enhancements, which amounts to no more than a mechanical process. In *Goldi*, the judge ruled that the process of enhancing photos using a computer program was purely mechanical and therefore not “original” for the purpose of attracting copyright protection. Goldi submitted that he had sourced the original photos, taken his own photographs of those photos, and then used a computer program to digitally enhance them. The Court concluded that this was a “purely mechanical process” as described in *CCH Canadian*, and thus the photos on Goldi’s website were not original works.

Goldi Productions Ltd v Bunch, 2018 CarswellOnt 15127, 296 ACWS (3d) 827 at para 15 [*Goldi*].

[38] In the same vein, Ms. Rer’s simple application of an automated electronic filter to each photograph should also be considered a mechanical process. In the same way the photos in *Goldi* were not skillful creations, Ms. Rer also did not meet the necessary threshold.

CCH Canadian, supra para 28 at para 16.

[39] The Supreme Court in *CCH Canadian* gave the example of changing the font of a work as a purely mechanical exercise. It stated, “any skill and judgment that might be involved in simply changing the font of a work to produce ‘another’ work would be too trivial to merit copyright protection as an ‘original’ work.” A change in font is akin to the use of a pre-set filter. Similar to how a font changes the appearance of a word in a predetermined way, a simple click of a button to add a filter changes the aesthetics of a photograph in the same way. This type of surface-level, mechanical edit does not warrant copyright protection. In fact, Ms. Rer’s offer to change the filters further illustrates the aimless nature and lack of conviction in her filter selection.

CCH Canadian, supra para 28 at paras 16, 35.

[40] The filtered photographs are non-original. Generally, photo-editing software on social media is intended to be user-friendly. It is made especially accessible to those with limited photography skills. However, such software does offer options where skill and judgement may be required, such as in its editing features. Filters are applied quickly with the click of a button – requiring no skill or judgement – whereas editing can involve discretionary thought in adjusting brightness, contrast, structure, warmth, saturation, color, fade, highlights, shadows, etc., on a sliding scale. This level of editing can lead to original works, but all Ms. Rer did was apply lacklustre filters that were both unoriginal and pre-set. There was no aptitude, artistic merit, or analysis in choosing filters presented to Bestmont.

[41] The application of instantaneous filters by Ms. Rer was in no way a demonstration of skill or knowledge. In *Toronto Board*, the Federal Court found that because a database was created

instantaneously, it did not meet the threshold of originality. Similarly, Ms. Rer's application of filters occurred instantaneously. There is no indication Ms. Rer exercised any skilled contemplation in creating the Filtered Photographs and thus are not original works.

Toronto Real Estate Board v Commissioner of Competition, 2017 FCA 236 at para 194 [*Toronto Board*].

iv. Not a compilation, just an incomplete project of filtered photographs

[42] The Façade photos are an incomplete set of filtered photos, not a compilation. Pursuant to s. 2(a) of the *Act*, a compilation is “a work resulting from the selection or arrangement.” Ms. Rer provided Bestmont with a selection of photos, while offering to apply additional filters to create different filtered images. The portfolio provided to Bestmont was not a compilation – it was just a sample of filtered photographs. It had not yet been arranged or selected to express an idea, but it was rather offered as a selection of photos for Bestmont to choose from.

Act, *supra* para 1, s 2(a).

Drouin (Succession de Côté-Drouin) v Pépin, 2020 QCCS 1424 at para 151 [*Drouin*].

[43] *Ladbroke* elaborated on compilations, describing the required originality as a matter of degree. It depends on the amount of skill, judgment or labour involved in making the compilation.

Ladbroke (Football) Ltd v William Hill (Football) Ltd, [1964] 1 WLR 273, 1 All ER 465 (UKHL) at 550 [*Ladbroke*].

[44] Incomplete projects are not original compilations. In *Geophysical Service*, the Court found that at the raw data level and the refined, processed data level, one ping from an underwater device that detects and records sounds did not meet the originality threshold for compilations – it did not make the data meaningful. Façades was an incomplete sampling of photos, not a compilation.

Geophysical Service Incorporated v Encana Corporation, 2017 ABQB 466 at para 77 [*Geophysical Service*].

Robertson v Thomson Corp, 2006 SCC 43 paras 36, 37 [*Robertson*].

Act, *supra* para 1, s 5(1)(a).

[45] Moreover, in *Slumber-Magic*, Madam Justice McLachlin, as she then was, held that where “work, taste and discretion have entered into the composition, that originality is established.” The

façade project was still being modified, thus the collection, arrangement, distillation and compilation that could create any originality in the work had not yet come to fruition.

Slumber-Magic Adjustable Bed Co Ltd v Sleep-King Adjustable Bed Co, 1984 CarswellBC 765, BCWLD 3079 at para 17 [*Slumber-Magic*].

B. Bestmont did not infringe copyright

[46] Given that Bestmont is the owner of the copyright in the design of each of its hotels and of the marquees, and that there is no originality in the photographs, Bestmont’s use of the photos cannot constitute an infringement. As previously established, Ms. Rer’s photos are not original works and, moreover, any similarities between Ms. Rer’s and Bestmont’s photos are at best, due to the limited nature of the industry and are not an act of a colourable imitation.

United Airlines Inc v Cooperstock, 2014 FC 157 at para 103 [*United Airlines*].

[47] There are two elements required to establish infringement by colourable imitation: sufficient similarity, and access to the work. The first of these, sufficient similarity, is at issue.

Pyrrha Design Inc v Plum and Posey Inc, 2019 FC 129 at para 121 [*Pyrrha Design*].

[48] Sufficient similarity cannot deal with the features of the works in piecemeal. The Supreme Court in *Cinar* specified that courts should not “dissect the work into its component parts to determine whether each individual component is original, protected and infringed.” Using a holistic assessment of what makes a work original, the Court in *Pyrrha Design* found that though Hardy may well have been inspired by Pyrrha to do wax seal jewelry, copyright did not exist “in either the idea of wax seal jewellery or in the process used to create such jewellery.” To this effect, even if Ms. Rer’s filtered photographs inspired individual components of Bestmont’s photos, the application of filters is the common, modern way to enhance photos. Bestmont used a different application that produced different results. Ms. Rer does not have copyright in the idea to compare Bestmont’s designs or in the process to filter the photos.

Cinar corporation v Robinson, 2013 SCC 73 at para 36 [*Cinar*].

Pyrrha Design, supra para 47 at para 153.

U & R Tax Services Ltd v H & R Block Canada Inc, 1995 CarswellNat 1343 at para 35, FCJ No 962.

[49] Infringement involves the reproduction of an important part of the protected work. As established in *Kilvington*, where there are common ideas and only a limited field for the expression of those ideas, there is no copyright infringement. Just as the “similarities” in the work of tombstone workers was “plain to be seen,” any similarity in the façade photos and Bestmont’s photos are a result of the limited style of filters that could be applied.

Kilvington Brothers Ltd v Goldberg, 1957 CarswellOnt 26 at para 7, 28 CPR 13 [*Kilvington*].

Issue Two: If Bestmont infringed, only a low quantum of damages is appropriate

[50] Canada’s copyright regime is a creature of statute – any right to remedy flows from the provisions of the *Act*. While Bestmont maintains it has not infringed Ms. Rer’s copyright, if copyright was found in Ms. Rer’s photos, statutory damages must be assessed under s. 38.1(1)(b). The use of the photos was for a non-commercial purpose. In accordance with s. 38.1(3)(b) and s. 38.1(5), Bestmont’s reasonable conduct and the minimal implications of its use of the photos necessitates a low award of damages. Moreover, while s. 38.1(7) permits an award of punitive damages, such an award cannot be justified.

Théberge, supra para 1 at para 5.

Act, supra para 1, ss 38.1(1)(b), 38.1(3)(b), 38.1(5), 38.1(7).

A. Bestmont’s use of the images was for a non-commercial purpose

[51] Bestmont’s display of the photos in a private area of its hotels was for a non-commercial purpose and statutory damages must be limited accordingly under s. 38.1(1)(b) of the *Act*. Section 38.1(1)(a) gives judges discretion to award damages within a higher range for infringements for *commercial* purposes, s. 38.1(1)(b) provides a lower range for *non-commercial* purposes.

Act, supra para 1, ss 38.1(1)(a), 38.1(1)(b).

Royal Conservatory of Music v MacIntosh, 2016 FC 929 at para 109 [*MacIntosh*].

i. A commercial purpose must have a clear connection to transactions for profit

[52] Bestmont’s decorative use of the images was for an unambiguously non-commercial purpose. Its use was not connected to any transactions for gain for Bestmont and did not impact the commercial market for Ms. Rer’s work.

[53] The *Act* does not define “commercial purpose” or “non-commercial purpose”. However, case law assessing these categories suggests that a commercial purpose is primarily profit driven, even if there are no actual profits. Moreover, the *Act*’s objects and Parliament’s recent s. 38.1(1) amendments indicate that a commercial purpose entails transactions for buying, selling, or licensing copyrighted works or the constituent rights therein.

CCH Canadian, supra para 28 at para 9.
Young v Thakur, 2019 FC 835 at para 45 [Young].
Act, supra para 1, s 38.1(1).

[54] “Commercial,” in the plain and ordinary sense of the word, demonstrates that a commercial purpose must involve financial transactions. The Canadian Oxford Dictionary defines commercial as “of, engaged in, or concerned with, commerce.” “Commerce” refers to “financial transactions.”

Katherine Barber, ed, *Canadian Oxford Dictionary*, 2nd ed (Canada: Oxford University Press, 2004) sub verbo “commercial,” “commerce.”
Rizzo & Rizzo Shoes Ltd Re, 1 SCR 27 at para 21.

[55] The *Act*’s object of protecting creators’ economic rights supports the conclusion that infringements for commercial purposes are those which clearly harm creators’ financial interests in their works. As stated in *Théberge*, the *Act* promotes “public interest in the encouragement and dissemination of the arts and intellect and obtaining a just reward for the creator.”

Théberge, supra para 1 at para 30.
Rallysport Direct LLC v 2424508 Ontario Ltd, 2020 FC 794 at para 25 [*Rallysport*].

[56] Copyright infringements for commercial purposes may interrupt and usurp creators’ potential for profits. Accordingly, infringement for commercial purposes includes activities like

transactions undertaken by unauthorized actors with the goal of profiting from the illicit commercialization of another's work, or activities which undermine legitimate transactions, unduly hindering artists' abilities to profit from their own work.

[57] Parliament implemented the commercial/non-commercial distinction in s. 38.1(1) of the *Act* to vary the penalty applied to infringements with serious financial implications for creators, from financially minimally impactful infringements. The underlying rationale is “commercial infringement requires a larger penalty because of the damage it may cause in the marketplace.”

House of Commons Debates, 41-1, vol 146 No 31 (18 October 2011) at 1330 (Mr Scott Simms).

[58] Using images solely to decorate a private space is not within the scope of behaviours that Parliament targets under s. 38.1(1)(a). Use for a non-commercial purpose, as is the case here, does not pose the same risk to creators' profits and, thus Parliament reduced the penalty for such uses.

ii. Bestmont's use of the images was unrelated to any commercial transactions

[59] The fact that Bestmont is a for-profit business does not mean that everything it does in relation to the business, such as displaying the photos, has a commercial purpose. In *MacIntosh*, the Court found that a non-profit institution had a commercial purpose in engaging in the transaction of publishing and selling copyrighted works, despite its non-profit status. The nature of the actor is not determinative – the *actual use* of the protected work is the relevant consideration.

MacIntosh, *supra* para 51 at paras 108, 111.

Pinto v Bronfman Jewish Education Centre, 2013 FC 945 at paras 6, 202-203.

[60] By hanging the images in a private area of its hotels, Bestmont did not impact the commercial viability of Ms. Rer's works in her market. Bestmont's decorative display of the images differs from the circumstances in *Collett*, in which the Court found that a gallery displaying a photographer's photos at a tradeshow, within their regular market, was an

infringement for a commercial purpose. In this case, Bestmont's display of the images was unrelated to social media and thus could not have disrupted Ms. Rer's primary market.

Collett v Northland Art Company Canada Inc, 2018 FC 269 at paras 24, 59, 61 [*Collett*].

[61] Additionally, the photos did not serve to influence customers' decisions to transact with Bestmont. The photos were located on private guest floors, only accessible by guests who had already paid for the hotel's services. Advertising has a commercial purpose as it promotes commercial transactions. Bestmont's use differs from promotional uses like in *Mejia*, in which the Court found posting photos to Facebook for an advertising campaign had a commercial purpose.

Mejia v LaSalle College International Vancouver Inc, 2014 BCSC 1559 at paras 177, 215 [*Mejia*].
Young, supra para 53 at para 45.

[62] Bestmont's desirable locations and impressive entrances are what attracts guests to its hotels. Bestmont's reputation for exterior design and luxury services, accrued over a century, was not affected by its temporally-limited display of photos in a discrete area of its hotels.

Trial, supra para 6 at para 2.

[63] Further, guest floor décor is peripheral to the Bestmont experience that their guests pay for. In *Lount Corp*, the Court found the cable service a hotel provided to its guest rooms was not a "commercial enterprise" in the context of the *Broadcasting Act*. The Court distinguished cable from profit-generating services, such as hotel restaurants and bars. Art located on guest floors is not "the essence of hotel accommodation" just as the provision of cable to guest rooms is not. This is especially true given that the guest floors merely serve as a conduit to the guest rooms.

Lount Corp v Canada (Attorney General), 1983 CarswellNat 96 at para 60, 2 WWR 152 [*Lount Corp*].

[64] There must be limits to what reasonably constitutes a commercial purpose. In *Lount Corp* the Court alluded to this limit in positing, "if a [housekeeper] gratuitously leaves a confection each evening on the pillow in each guest room, must that 'free' service be held to be a confectionary

undertaking?” Like a complementary candy, art may marginally enhance the guest experience. Such enhancements are an incidental cost of operating a luxury hotel, not a billable service.

Lount, supra para 63 at para 24.
Trial, supra para 6 at para 21.

[65] A commercial purpose requires a clear connection to commercial transactions. For example, in *Patterned Concrete* the Court found that reproductions of contract forms were used commercially in the facilitation of transactions. Unlike contract forms, décor is too far removed from customer transactions to have a commercial purpose, even in the hospitality industry.

Patterned Concrete, supra para 30 at para 70.

B. A low award of damages under section 38.1 is warranted

[66] Having established Bestmont’s use was non-commercial, this Court must assess the appropriate quantum of damages under ss. 38.1(1)(b) and 38.1(5) of the *Act*. In determining damages, ss. 38.1(5)(a)-(c) factors in the good or bad faith of the defendant, the parties’ conduct, and the need for deterrence. Further, where an infringement is for non-commercial purposes, s. 38.1(5)(d) states that the award must be proportionate to the infringement, with reference to the impact or hardship for the plaintiff, and the private or public nature of the infringement.

Act, supra para 1, ss 38.1(1)(b), 38.1(5)(a)-(d).

i. Bestmont acted reasonably and not in bad faith

[67] Bestmont’s conduct was reasonable in light of its genuine and honest belief that Ms. Rer did not have copyright in the images. Believing Ms. Rer had violated its registered copyright in the hotel design and marquee, Bestmont requested that Ms. Rer destroy her copies of the images. Bestmont reasonably presumed it could reproduce its copyrighted works, in its own version of the images, for use as decoration in the hotels. Moreover, it had no information to confirm the contrary.

Trial, supra para 6 at paras 10, 11.

[68] Bestmont sought to address Ms. Rer's legal claims fairly and efficiently. When the case was set for trial, Bestmont took the images down, eliminating the Court's need to consider an injunction. In doing so, Bestmont cooperated with Ms. Rer, even though Bestmont maintained she did not have copyright in the images, rather than waste the Court's time and resources.

Trial, supra para 6 at paras 10, 11.

[69] By comparison, in *Telewizja*, the defendant actively neglected the legal proceedings, ignored the plaintiff's "offer not to litigate if the infringement ceased," and increased its infringing activities. The Court found bad faith in this deliberate disrespect for the Court's processes.

Telewizja Polsat SA v Radiopol Inc, 2006 FC 584 at para 50 [*Telewizja*].
Microsoft Corp v Liu, 2016 FC 950 at para 23 [*Liu*].

[70] Bestmont's conduct is easily distinguishable from past decisions in which courts found bad faith for highhanded conduct. For instance, in *Trout Point Lodge*, the Court found the defendant's use of the plaintiff's photographs for defamatory purposes clearly indicated bad faith. Bestmont's behaviour did not reach this level – it was not malicious, and it did not harm Ms. Rer's reputation.

Trout Point Lodge Ltd v Handshoe, 2014 NSSC 62 at paras 18, 21-25 [*Trout Point Lodge*].
Collett, supra para 60 at para 61.

[71] If Bestmont was mistaken as to the copyright in the images, it was not in bad faith. Similarly, in *Trader Corp*, the Court found the defendant's misuse of copyrighted images resulted from an inaccurate presumption, not bad faith. As well, in *Century 21*, the Court stated that failure to consider "legal issues surrounding copyright," including ownership, did not equate to bad faith.

Trader Corp v CarGurus Inc, 2017 ONSC 1841 at para 62.
Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 at paras 403-405 [*Century 21*].
Young, supra para 53 at para 63.

ii. Deterrence of Bestmont's behaviour is not a compelling factor

[72] Bestmont's behaviour does not require deterrence. This is not a case in which a powerful corporation plotted to steal from an artist, as Justice Lodge suggests. Bestmont was not motivated

to take advantage of Ms. Rer, harm her interests, or profit from her work. Bestmont used the images believing it owned the copyright therein. If it was mistaken, its misuse was innocent and limited. This is a highly context-specific case, rather than a predatory pattern in need of judicial redress.

Trial, supra para 6 at para 24.

[73] There is no risk of recidivism here. Bestmont’s removing of the images demonstrates a good faith intention to manage the dispute. Moreover, Bestmont did not incur any benefit, financial or otherwise, that would encourage them to use the images again. Conversely, both in *King* and *Liu*, the Court focused on deterring recidivism as the defendants in those cases ran businesses based on illicitly appropriating intellectual property and failed to adhere to previous court orders.

Nintendo of America Inc v King, 2017 FC 246 at paras 159, 163 [*King*].
Liu, supra para 69 at para 23.

iii. The award of damages must be proportional to the minimal infringement

[74] Statutory damages must be proportionate to both commercial and non-commercial infringements. As stated in *Telewizja*, “statutory damages require an assessment of the reality of the case and a just result” and there should be a connection between the award and actual damages.

Act, supra para 1, s 38.1(5)(d).
Telewizja, supra para 69 at paras 37, 45.

[75] Ms. Rer has not suffered any loss. Travel, such as her cross-Canada trip, is a standard part of social media influencing. This trip is not a distinct production cost warranting compensation.

Rallysport, supra para 55 at para 25.
Young, supra para 53 at para 57.

[76] If Bestmont did in fact infringe Ms. Rer’s copyright, it amounts to nothing more than a “technical” breach, in that Ms. Rer was minimally impacted and Bestmont did not profit from its use of the images. According to *Nicholas*, in such circumstances a high award of damages would be disproportionate to the limited nature of the alleged infringement.

Nicholas v Environmental Systems (International) Ltd, 2010 FC 741 at para 105 [*Nicholas*].

[77] The Court of Appeal correctly applied s. 38.1(3)(b) to reduce the award to \$15,000. Bestmont's use of the ten Original Photos was worth \$30,000 based on Ms. Rer's license proposal. However, Bestmont's use was not for a commercially-valuable promotional purpose, as the proposed fee stipulated. Thus, \$30,000 is grossly disproportionate to Bestmont's actual use. With no bad faith, no financial benefit to Bestmont, and no harm to Ms. Rer, an award exceeding the bare value of Bestmont's non-commercial use of the images would unjustly enrich Ms. Rer.

Appeal, supra para 20 at para 9.

[78] The massive quantum of damages reached at trial does not reflect the *Act's* object of promoting a *just* award for creators. As stated in *Théberge*, “[i]n crassly economic terms it would be as inefficient to overcompensate artists ... as it would be self-defeating to undercompensate them.” Justice Lodge's assessment of damages would set a precedent of overcompensation, permitting creators to exploit Canada's copyright protections.

Théberge, supra para 1 at para 31.
Trial, supra para 6 at para 25.

C. An award of punitive damages is not justified

i. Punitive damages cannot be awarded if they are not pleaded

[79] It would be inequitable for this Court to consider an award for punitive damages when Ms. Rer did not claim them, as Bestmont lacks the required notice. Punitive damages must only be assessed *if* claimed by the applicant. *Whiten* affirmed that as a matter of fairness, punitive damages must be expressly claimed to allow the defendant to respond to the entire case against them. In failing to plead punitive damages, Ms. Rer has barred herself from this type of award.

Whiten v Pilot Insurance Co, 2002 SCC 18 at paras 86-87 [*Whiten*].

ii. Bestmont's conduct does not reach the threshold for punitive damages

[80] Even if Ms. Rer had properly pleaded punitive damages, such an exceptional award is not warranted in this case. Straddling the line between civil law and criminal law, punitive damages are reserved for “malicious, oppressive and high-handed” behaviour. Moreover, according to *Rundle*, an award of punitive damages can only be justified where statutory damages alone cannot sufficiently punish the impugned conduct. Bestmont did not even act in bad faith, let alone engage in a quasi-criminal level of misconduct that could justify an award of punitive damages.

Whiten, supra para 79 at para 36.
Canada (Attorney General) v Rundle, 2014 ONSC 2136 at para 16 [*Rundle*].
Parker v Key Porter Books, 2005 CarswellOnt 2098 at para 29, OJ No 2093.
Young, supra para 53 at para 52.

[81] Bestmont's behaviour is incomparable to the outlandish behaviour that has attracted high punitive damages in other cases. For example, in *Singga*, the Court awarded \$550,000 in punitive damages. The defendants had sold counterfeit goods over a substantial period and deliberately attempted to their conceal wrongdoing. Evidently, Justice Lodge's assessment is superfluous.

Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc, 2011 FC 776 at paras 171-180 [*Singga*].
King, supra para 73 at paras 171, 174.
Liu, supra para 69 at paras 33, 34.
Cinar, supra para 48 at paras 139, 141.
Trial, supra para 6 at para 20.

PART V: ORDER REQUESTED

The Respondent respectfully requests that this Honourable Court dismiss the appeal and restore the Judgement of the Court of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 28th day of January 2022.

Team No. 2R

Counsel for the Respondent

PART VI: TABLE OF AUTHORITIES

LEGISLATION	PARAGRAPHS
<i>Copyright Act</i> , RSC 1985, c C-42.	1, 23, 24, 25, 29, 34, 42, 44, 50, 51, 53, 66, 74.
<i>Berne Convention for the Protection of Literary and Artistic Works</i> , WIPO (1982, Geneva).	32.

JURISPRUDENCE	PARAGRAPHS
<i>Ateliers Tango Argentin Inc v Festival d’Espagne et d’Amérique Latine Inc</i> , [1997] JQ no 3693, RJQ 3030.	36.
<i>Canada (Attorney General) v Rundle</i> , 2014 ONSC 2136.	80.
<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13.	28, 30, 32, 34, 38, 39, 53.
<i>Century 21 Canada Ltd Partnership v Rogers Communications Inc</i> , 2011 BCSC 1196.	71.
<i>Cinar Corporation v Robinson</i> , 2013 SCC 73.	48, 81.
<i>Collett v Northland Art Company Canada Inc</i> , 2018 FC 269.	60, 70.
<i>Delrina Corp v Triolet Systems Inc</i> , 2002 CarswellOnt 633, OJ No 676.	35.
<i>Drouin (Succession de Côté-Drouin) v Pépin</i> , 2020 QCCS 1424.	42.
<i>Geophysical Service Incorporated v Encana Corporation</i> , 2017 ABQB 466.	44.
<i>Goldi Productions Ltd v Bunch</i> , 2018 CarswellOnt 15127, 296 ACWS (3d) 827.	37.
<i>Kilvington Brothers Ltd v Goldberg</i> , 1957 CarswellOnt 26, 28 CPR 13.	49.
<i>Ladbroke (Football) Ltd v William Hill (Football) Ltd</i> , [1964] 1 WLR 273, 1 All ER 465 (UKHL).	43.
<i>Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc</i> , 2011 FC 776.	81.
<i>Lount Corp v Canada (Attorney General)</i> , 1983 CarswellNat 96, 2 WWR 152.	63, 64.
<i>Mejia v LaSalle College International Vancouver Inc</i> , 2014 BCSC 1559.	61.
<i>Microsoft Corp v Liu</i> , 2016 FC 950.	69, 73, 81.
<i>Nicholas v Environmental Systems (International) Ltd</i> , 2010 FC 741.	76.
<i>Nintendo of America Inc v King</i> , 2017 FC 246.	73, 81.
<i>Parker v Key Porter Books</i> , 2005 CarswellOnt 2098, OJ No 2093.	80.
<i>Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd</i> , 2021 FC 314.	30, 65.
<i>Pinto v Bronfman Jewish Education Centre</i> , 2013 FC 945.	59.
<i>Pyrrha Design Inc v Plum and Posey Inc</i> , 2019 FC 129.	47, 48.
<i>R v Hicks</i> , 2013 NSCA 89.	26.
<i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2020 FC 794.	55, 75.
<i>Red Label Vacations Inc v 411 Travel Buys Ltd</i> , 2015 FC 18.	35.
<i>Rizzo & Rizzo Shoes Ltd Re</i> , 1 SCR 27.	54.

<i>Robertson v Thomson Corp</i> , 2006 SCC 43.	44.
<i>Royal Conservatory of Music v MacIntosh</i> , 2016 FC 929.	51, 59.
<i>Slumber-Magic Adjustable Bed Co Ltd v Sleep-King Adjustable Bed Co</i> , 1984 CarswellBC 765, BCWLD 3079.	45.
<i>Telewizja Polsat SA v Radiopol Inc</i> , 2006 FC 584.	69, 74.
<i>Théberge v Galerie d'Art du Petit Champlain Inc</i> , 2002 SCC 34.	1, 32, 50, 55, 78.
<i>Therrien v Schola Inc</i> , 1981 CarswellNat 1035, 8 ACWS (2d) 66.	27.
<i>Toronto Real Estate Board v Commissioner of Competition</i> , 2017 FCA 236.	41.
<i>Trader Corp v CarGurus Inc</i> , 2017 ONSC 1841.	71.
<i>Trout Point Lodge Ltd v Handshoe</i> , 2014 NSSC 62.	70.
<i>United Airlines Inc v Cooperstock</i> , 2014 FC 157.	46.
<i>U & R Tax Services Ltd v H & R Block Canada Inc</i> , 1995 CarswellNat 1343, FCJ No 962.	48.
<i>Whiten v Pilot Insurance Co</i> , 2002 SCC 18.	79, 80.
<i>Wiseau Studio, LLC et al v Harper et al</i> , 2020 ONSC 2504.	32.
<i>Young v Thakur</i> , 2019 FC 835.	53, 61, 71, 75, 80.

SECONDARY SOURCES	PARAGRAPHS
<i>House of Commons Debates</i> , 41-1, vol 146 No 31 (18 October 2011).	57.
Katherine Barber, ed, <i>Canadian Oxford Dictionary</i> , 2 nd ed (Canada: Oxford University Press, 2004).	54.

OFFICIAL MOOT SOURCES	PARAGRAPHS
<i>Bestmont v Wanda Rer</i> , 2021 CAIP 333.	20, 77.
<i>Wanda Rer v Bestmont Hotels</i> , 21 TCCIP 1222.	6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 24, 32, 62, 64, 67, 68, 72, 78, 81.

PART VII: APPENDIX

Appendix A

Copyright Act, RSC 1985, c C-42

Definitions

2 In this Act,

artistic work includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works (*oeuvre artistique*).

compilation means

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or

Conditions for subsistence of copyright

5 (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country.

Permitted acts

32.2 (1) It is not an infringement of copyright

[...]

(b) for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work

(i) an architectural work, provided the copy is not in the nature of an architectural drawing or plan, or

(ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building.

Statutory damages

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

- (a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and
- (b) in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.

Special case

38.1 (3) In awarding statutory damages under paragraph (1)(a) or subsection (2), the court may award, with respect to each work or other subject-matter, a lower amount than \$500 or \$200, as the case may be, that the court considers just, if

[...]

- (b) the awarding of even the minimum amount referred to in that paragraph or that subsection would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.

Factors to consider

38.1 (5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

- (a) the good faith or bad faith of the defendant;
- (b) the conduct of the parties before and during the proceedings;
- (c) the need to deter other infringements of the copyright in question.
- (d) in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff.

Exemplary or punitive damages not affected

38.1 (7) An election under subsection (1) does not affect any right that the copyright owner may have to exemplary or punitive damages.

Owner of copyright

53 (2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.